IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 165 OF 2005
WITH
CRIMINAL APPEAL NO. 17 OF 2006

Shri Umesh Redkar,
Panaji Goa. ..... Applicant

V e r s u s

Shri Joseph A. Fernandes,
Ponda, Goa. ..... Respondent

Shri Rohit Bras De Sa, Advocate for the Applicant.

Shri S. D. Padiyar, Advocate for the Respondents.

CORAM: N. A. BRITTO, J.

DATE: 24th March, 2006.

ORAL ORDER

Heard Shri Rohit Bras De Sa, the learned Counsel on behalf of the applicant/Complainant and Shri S. D. Padiyar, the learned Counsel on behalf of the respondent/accused.

2. Special Leave granted.

3. The applicant is the Complainant in C.C. no. 300/OA/2000/B. The Complainant has filed the said case against the accused under Section 138 of the Negotiable Instruments Act, 1881. On 20.07.2005, the case of the Complainant was fixed for the Complainant's evidence. However, neither the Complainant nor his Advocate remained present before the Court and the learned J.M.F.C., in terms of Section 256 of the Code of Criminal Procedure, 1973, (Code, for short), proceeded to acquit the accused under the said Section, observing as follows:-

> "Complainant absent. Advocate for Complainant absent. Accused present with his Advocate Ramnathkar. Matter was kept back till rising of the Court and since the Complainant was not present and also affidavit in evidence not filed with an advance copy to accused inspite of the direction given to Complainant on the last date of hearing, it appears that the Complainant is not interested in proceeding with the matter. Complaint is dismissed under Section 256 of Cr.P.C. for non-appearance of Complainant and accused is acquitted for offence punishable under Section 138 of the N. I. Act . Proceedings closed."

4. The case of the Complainant is that he has a history of heart disease and high blood pressure and because of medical condition, the Complainant was unable to give proper instructions to his Advocate and also be present for the purpose of recording evidence. The Complainant also filed an affidavit stating that during the period from 10.07.2005 to 30.07.2005, he was under the care and treatment of Dr. Rufino Monteiro, Physician and Cardiologist and that during the said time, he was suffering from unstable Angina and was advised complete bed rest as that was absolutely essential for his recovery. In order to justify his absence, the Complainant produced a medical certificate dated 17.06.2005, issued by Apollo Victor Hospitals, which shows that the Complainant had suffered a heart attack on 08.03.2005 and had undergone Angioplasty on 05.05.2005. The certificate issued by Dr. Rufino Monteiro shows that the Complainant, despite the said Angioplasty, was suffering from unstable Angina and was under his treatment from 10.07.2005 to 30.07.2005 and was advised bed rest for the said period as it was absolutely essential for his recovery. It is the case of the Complainant that on account of the said treatment, he was unable to contact his Advocate and give instructions regarding his inability to remain present on 20.07.2005 and as no instructions were given,

probably, his Advocate remained absent before the Court. What has been stated by the Complainant and reproduced hereinabove, has been contested by the accused by stating that even in case the Complainant was unable to attend the Court, nothing prevented the Complainant's representative to appear before the Court and stating the factum of illness of the Complainant to his Advocate and/or to the Court and, even otherwise, the Complainant's lawyer was duty bound to remain present before the Court in as much as no application for exemption was moved by the Complainant before the said Court on 20.07.2005.

5. The question before the Court is whether the learned J.M.F.C. exercised the discretion properly, fairly and in accordance with law in acquitting the accused in view of the absence of the Complainant and/or his Advocate on 20.07.2005.

6. Section 256 of the Code of Criminal Procedure, 1973, deals with non-appearance or death of the Complainant and, consequently, the acquittal of the accused. The Sections visualizes three situations. As noted by the Division Bench of the Kerala High Court in the case of ***C. K. Sivaraman Achari v. D. K. Agarwall & anr. (1978 Cri. L. J. 1376),*** there

are three courses open to the Court in a case whether Complainant is absent on the date of hearing, namely :-

(i) acquit the accused; or

(ii) adjourn the case for a future date; or

(iii) dispense with the attendance of the Complainant and proceed with the case;

and which of the course is to be followed in a particular case is entirely left to the discretion of the Court, which discretion, however, is expected to be exercised in a judicial manner and while exercising the discretion, the Court should not forget that the very existence is for dispensation of justice, no doubt within the framework of the Statutes governing particular cases. The Division Bench has also noted that while maintaining the presumption of the innocence of the accused, the Court should not be harsh towards the Complainant and the reasons for absence of the Complainant could be numerous including sometimes beyond his control or sometimes frivolous and even though the Magistrate is not bound by the provisions of the Statute to do so, there is nothing wrong in adjourning the case to another date so that he may satisfy himself that the absence of the Complainant was not due to lack of diligence or if the Complainant's presence is not required

on the particular day, he may dispense with his attendance and proceed with the case and in all such cases, the Magistrate is expected to take stock of the whole situation before he uses his discretion and decides the course to be followed. The Magistrate should not view the absence of the Complainant as a short cut for disposal of the case.

7. In the case of ***Shiv Kumar v. Mohd. Saghir & Ors. (1997 CRI. L. J. 1264)***, a Division Bench of Delhi High Court stated that dismissal of a complaint for non-appearance is one of the options given to the Magistrate. He has other options too. He has the discretion to adjourn the hearing of the case to some other date. He has also the discretion to dispense with the attendance of the Complainant and proceed with the complaint. When a Statute vests various options with the Magistrate, it is necessary that the option which he adopts should be exercised judicially and to advance the cause of justice. It was further held that the Complainant as well as his Advocate had remained absent on 20.05.1996 and the Court observed that the absence was neither intentional nor it could be said due to negligence.

8. Both the parties have placed reliance on the decision of the Supreme Court in the case of ***Associated Cement Co. Ltd., v. Keshvanand***

(AIR 1998 S.C. 596) and Shri Padiyar, the learned Counsel on behalf of the accused has also placed reliance on the decision of this Court in the case of ***M/s. Lloyds Finance Ltd., v. M/s. SKG Solvex Ltd., & Ors. (2002 CRI. L. J. 2764)***, wherein the decision of the Apex Court in ***Associated Cement Co. Ltd.***(supra) was followed.

9. In the case of ***Associated Cement Co. Ltd.***(supra), the Supreme Court stated that reading of Section 256 in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. First, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second, when the Magistrate considers that personal attendance of the complainant is not necessary on that day, the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the Complainant is absent on a particular day, the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also <u>whether the situation does not justify the case being adjourned to another date due to any other reason</u>. If the situation does not justify the case being adjourned, the Court is free to dismiss the complaint and acquit the accused but, if the presence of the

Complainant on that day was quite unnecessary, then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the Section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.

10. Much emphasis has been placed on behalf of the Complainant on the above underlined observation of the Supreme Court. It is contended on behalf of the Complainant, that no reason for acquittal of the accused in the light of the absence of the Complainant has been mentioned by the learned J.M.F.C. in her Order acquitting the accused.

11. There is no doubt that the presence of the Complainant was required on 20.07.2005, for the Complainant had to remain present on that day before the Court to give his evidence. It may be that he had to remain present along with his affidavit to be cross examined on behalf of the accused and the Complainant had admittedly not appeared before the Court. It is nobody's case that the Complainant had earlier remained absent when his presence was required before the Court. In other words, it is not the case of the accused that the Complainant was otherwise not vigilant.

Admittedly, the Complainant was prosecuting the accused for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881, in respect of a cheque of Rs.6,00,000/-, which had bounced and, in a situation like this, the learned J.M.F.C., was certainly not expected to be unnecessarily too harsh or hasty towards the Complainant and immediately proceed to dismiss the complaint and acquit the accused. Admittedly, an Order of acquittal under Section 256 of the Code has the effect of barring a fresh trial and causing irreparable injury to the Complainant. Since the Complainant has remained absent for the first time for the purpose of giving evidence, the situation certainly justified that an opportunity could be given to the Complainant to prosecute his case and this on the assumption that there always could have been some good reason for the Complainant to remain absent. As already stated, no reason has been assigned by the learned J.M.F.C. for not adjourning the case. The past conduct of the Complainant of remaining absent might have been a good reason but there was none of that type. Unless the Complainant is found to be negligent in taking steps for the hearing, a J.M.F.C should be rather slow to exercise the discretion vested in him under Section 256 of the code and acquit the accused. The only reason why the complaint came to be dismissed was the absence of the Complainant and his Advocate. In my view, the learned

J.M.F.C. was too harsh and hasty in proceeding to dismiss the complaint and acquit the accused and in that the learned J.M.F.C. did not exercise the discretion fairly and judiciously and, therefore, the appeal deserves to succeed. Consequently the Order 20.07.2005 is hereby set aside and the complaint is restored to file. The learned J.M.F.C. is directed to proceed with the trial of the complaint and dispose of the case as expeditiously as possible and in accordance with law. Appeal allowed.

N. A. BRITTO, J.

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